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6 IN THE MATTER OF THE
7 COMPETITION IN THE PROVISION OF
ELECTRIC SERVICES THROUGHOUT
THE STATE OF ARIZONA.

DOCKET No. RE-00000C-94-0165

Arizona Corporation Commission
DOCKETED

MAR 23 1998

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14 REBUTTAL BRIEF
OF
15 ARIZONANS FOR ELECTRIC CHOICE AND COMPETITION,
ASARCO INCORPORATED, AND CYPRUS CLIMAX METALS COMPANY

16
17 March 23, 1998

18
19 Submitted by:
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22 Incorporated, and Cyprus Climax
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1 Arizonans for Electric Choice and Competition,¹ ASARCO,
2 Incorporated and Cyprus Climax Metals Corporation (collectively
3 referred to herein as the "AECC"), hereby submit their Responsive
4 Brief regarding stranded cost recovery.

5 In this Responsive Brief, AECC will address the
6 significant issues discussed by the Affected Utilities in their
7 initial briefing. First, the Affected Utilities' positions on
8 many of the key issues posed by the Chief Hearing Officer are
9 insupportable. Their adoption would be both inequitable and
10 contrary to the objectives set by the Commission in adopting the
11 Electric Competition Rules (the "Rules").

12 Second, AECC will respond to the Affected Utilities'
13 continued reliance on a binding regulatory contract as a means of
14 justifying the opportunity to recover 100% of their alleged
15 stranded costs. In short, there is no legal basis for
16 guaranteeing the Affected Utilities 100% recovery of all of their
17 stranded costs.

18 **I. AECC'S RESPONSE TO THE AFFECTED UTILITIES' POSITIONS ON KEY**
19 **ISSUES.**

20 **A. It Would Be Inequitable and Contrary to the Objective**
21 **of the Rules to Allow the Affected Utilities to Recover**
22 **All of Their Stranded Costs.**

23 The Affected Utilities argue that the Rules support
24 full recovery of stranded costs. See Tucson Electric Power's
25 Initial Brief at 8, lns. 1-9; Arizona Public Service Company's
26 Initial Brief at 19, lns. 3-9; Citizens Utilities Company's
27 Initial Brief at 11, lns. 10-12. Notably, the Commission's

28 ¹ Arizonans for Electric Choice and Competition is a coalition of
consumers, who were identified by name in AECC's Initial Brief.

1 "Evaluation of the Arguments for and Against the Amendments"
2 (published with the Rule as part of Decision No. 59943 and
3 referenced by APS counsel numerous times during the hearing)
4 provide only that the Rules guaranty recovery of "unmitigated
5 Stranded Cost;" conspicuously absent from this definition are the
6 words "full recovery of all stranded costs."

7 Moreover, in the context of the eleven factors to be
8 considered in designing recovery mechanisms and charges, it is
9 more plausible to interpret the Commission's "guarantee" language
10 as meaning "some recovery" rather than "full recovery."
11 Logically, less than "full" recovery must be possible under the
12 Rule in order to satisfy several of the factors, e.g., impact on
13 competition, impact on customers in the competitive market.

14 In addition, equity dictates that utilities, who have
15 been aware that competition was inevitable for many years, share
16 the burdens of the transition with customers. After all, the
17 benefits of competition in electric power generation will be
18 shared with the Affected Utilities. Indeed, if customers are
19 overburdened with all of the costs of deregulation, the objectives
20 of the transition to a competitive paradigm will be lost.

21 Even under regulation, recovery of all prudent costs is
22 not guaranteed - there is merely the opportunity for recovery.
23 Similarly, AECC's proposal for "sharing" is not intended to be a
24 "disallowance" - but a designation of a portion of potentially
25 stranded cost to be placed at-risk to the utility. The portion
26 placed at-risk can be recovered (or even over-recovered) through
27 mitigation. This ability to recover at-risk stranded costs
28 through mitigation is separate and apart from the long-term

1 benefits conveyed to asset owners from the removal of regulation
2 of generation. This latter circumstance alone demands taking into
3 account the interests of the customers in the design of the
4 recovery mechanism.

5 **B. The Affected Utilities' "Everything and the Kitchen**
6 **Sink" Approach to Defining Stranded Costs Is**
7 **Inappropriate.**

8 In their initial briefs, the Affected Utilities urge
9 the Commission to modify the Rules further by expanding the
10 definition of stranded costs. In short, the Affected Utilities
11 want to enlarge the definition of stranded costs to include
12 anything and everything the Affected Utilities can contemplate.
13 For instance, APS proposes to include all post-1996 transition
14 costs, including, among other things, employee transition
15 expenses, costs of asset sales and costs associated with meeting
16 standard offer requirements such as metering and billing expenses.
17 APS Initial Brief at 2-4. Likewise, TEP seeks to include a
18 laundry list of "uneconomic generation costs" (e.g., O&M and A&G
19 costs, above-market fuel contracts, taxes, capital leases) as well
20 as labor costs in stranded cost recovery. TEP Initial Brief at
21 15. See also Citizens' Initial Brief at 13 (stranded costs should
22 include non-generation-related costs and costs incurred to meet
23 requirements of new distribution companies).

24 The Affected Utilities' attempt to include every
25 imaginable item as a component of "stranded cost" must be
26 rejected. By including every possible cost in the definition of
27 stranded costs, the Affected Utilities will ensure that the
28 transition to a competitive marketplace for generation is doomed
from the outset. Moreover, by including post-1996 costs, the

1 Affected Utilities' approach leaves consumers and the Commission
2 uncertain as to the total amount of stranded costs to be recovered
3 as a result of deregulation. Thus, the Commission's approach that
4 stranded costs include those generation-related fixed costs
5 incurred by the Affected Utilities through 1996, plus regulatory
6 assets, should be left unchanged.

7 **C. The Affected Utilities' Reliance on the Net Revenues Lost**
8 **Approach Is Flawed.**

9 Any use of the net revenues lost approach must
10 incorporate protections that limit the potentially huge negative
11 consequences to consumers from using that approach. These
12 negative consequences stem from five major sources:

- 13 1. The underlying presumption of the net revenues
14 lost approach that stranded costs include whatever
15 additional amount consumers would have had to pay
16 for electric power if regulation continued and
17 competition never occurred. This presumption, if
combined with 100 percent recovery through a
transition charge on customers, completely defeats
the purpose of moving to a competitive market.
- 18 2. The potential for overemphasizing the impact of
19 short-term periods when electricity prices may be
20 below long-run marginal costs, and ignoring the
21 benefits to utility owners associated with long-
term freedom from the regulation of generation
prices. Such an overemphasis would likely lead to
a stranded-cost-recovery windfall for utilities.
- 22 3. The risk of relying on a single administrative
23 approach for stranded cost estimation.
- 24 4. The potential for including in the analysis cost
25 items and assumptions that are too generous to the
26 utility, e.g., A & G costs, non-declining
operating costs, return on equity at current
rates, inappropriately low market prices (such as
the wholesale indices proposed by APS).
- 27 5. Results that are heavily dependent on assumptions
28 made regarding the future market price of power -
a highly speculative endeavor.

1 These negative consequences can be mitigated by
2 adopting either: (1) auction and divestiture, (2) replacement
3 cost valuation, or (3) the AECC replacement cost/net revenues lost
4 hybrid.

5 **D. Plausibility of Recovering At-risk Stranded Cost**
6 **Through Mitigation.**

7 The Affected Utilities also seek to lower the bar
8 regarding the requirement that they seek to mitigate their
9 stranded costs. APS argues that "no one can seriously believe
10 (and no witness testified) that 50% or more of stranded costs can
11 be recovered through further mitigation during the transition
12 period." APS Initial Brief at 12, ln. 26-13, ln. 5. In addition,
13 all of the Affected Utilities argue that requiring utilities to do
14 anything more than "be reasonable" in their mitigation efforts is
15 impossible. APS Initial Brief at 11, lns. 14-16; TEP Initial
16 Brief at 23, lns. 17-19; Citizens Initial Brief at 27, lns. 18-22.
17 This position, at best, serves only the interests of the Affected
18 Utilities and would be unfair and inequitable to the consumers.

19 AECC's witness, Kevin Higgins, concluded that, in the
20 first two years of the phase-in, with a 50/50 sharing of stranded
21 cost responsibility, it is plausible that the "at-risk" portion of
22 stranded costs would be equivalent to about 2 percent of total
23 utility costs. Recovering stranded costs through mitigation
24 (which includes cost reductions, as well as revenue enhancements)
25 is eminently reasonable.

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1 **II. THERE IS NO REGULATORY CONTRACT.**

2 **A. The Utilities Do Not Meet Their Burden of Proving the**
3 **Existence of a Regulatory Contract with Respect to**
4 **Generation.**

5 "[A]bsent some clear indication that the legislature
6 intends to bind itself contractually, the presumption is that 'a
7 law is not intended to create private contractual or vested rights
8 but merely declares a policy to be pursued until the legislature
9 shall ordain otherwise.'" National Railroad, 470 U.S. at 465-66
10 (quoting Dodge v. Board of Education of City of Chicago, 302 U.S.
11 74, 79 (1937)).

12 The Affected Utilities have failed to present clear
13 evidence to rebut the strong legal presumption against the
14 legislative grant of contractual rights. To accept the Affected
15 Utilities' position would mean holding that each of the utilities
16 has perpetual and non-terminable contracts with the State of
17 Arizona guarantying the continuation of a regulated noncompetitive
18 market *ad infinitum*. This position is simply untenable.

19 In support of their position, the Affected Utilities
20 have failed to cite to one Arizona opinion, in which the court has
21 stated that a regulatory contract exists. Instead, the only case
22 the Affected Utilities cite is an opinion of the Hawaii Public
23 Utility Commission regarding assessing a statewide surcharge in
24 response to a hurricane, Citizens Utilities Company, Kauai
25 Electric Division, Docket Nos.94-0097 and 94-0308. In addition to
26 the fact that this matter has no precedential authority whatsoever,
27 the facts underlying that case are clearly distinguishable from
28 those of the present.

There, the Hawaii legislature enacted legislation

1 providing that the affected utilities could recover their
2 restoration and repair costs incurred in response to a devastating
3 hurricane on the island of Kauai in 1992. Because there was no
4 competitive market, the utilities were required to repair the
5 damage from the hurricane and continue to provide electricity to
6 the consumers. Unlike the present matter, the utilities were
7 confronted by a lose/lose situation. There was no possible
8 benefit associated with the hurricane and the damage it caused and
9 the utilities could not mitigate the disaster.

10 Here, the Affected Utilities stand to benefit and
11 profit from the transition to a competitive market. The Affected
12 Utilities do not deny this fact. Moreover, to the extent that the
13 utilities realize some stranded costs, they each have an
14 opportunity to mitigate same. It is upon this basis that AECC
15 urges the Commission to recognize the sharing of the
16 responsibility for stranded cost recovery.

17 **B. Arizona Case Law Does Not Support the Imposition of a**
18 **Regulatory Contract.**

19 The Affected Utilities rely upon one excerpt from
20 Arizona case law in support of their position that the State
21 entered into binding contracts with the utilities. Specifically,
22 they cite Application of Trico Electric Co-operative, Inc., 92
23 Ariz. 373, 380-81, 377 P.2d 309, 315 (1962) and the following
24 passage contained therein:

25 In the performance of its duties with respect to public
26 service corporations the Commission acts as an agency
27 of the State. By the issuance of a certificate of
28 convenience and necessity to a public service
corporation the State in effect contracts that if the
certificate holder will make adequate investment and
render competent and adequate service, he may have the

1 privilege of a monopoly against any other private
2 utility. Trico's right to maintain its distribution
3 lines in the area of its certificate, and to make
4 extensions therefrom to customers resulting from the
5 development of the area served by it, is a vested
6 property right, protected by Article 2, Section 17, of
7 the Arizona Constitution, A.R.S. City of Tucson v.
8 Polar Water Co., 76 Ariz. 404, 265 P.2d 773.

9 Id. at 380-81, 377 P.2d at 315 (emphasis added). The foregoing
10 passage, in addition to being dicta, does not support the
11 utilities' position of a regulatory contract regarding generation.

12 Trico was decided in a different technological and
13 regulatory era. In Trico, the court simply recognized that Trico
14 had built a distribution system to carry out its obligation to
15 serve all of the customers in its territory, and that the company
16 had a vested property right in its distribution system.² However,
17 it does not follow that a utility has a right to monopolize the
18 generation of power, or the sale of electricity to end users.

19 The concept of "regulated monopoly" is a public policy
20 designed to spare consumers the unnecessary costs that arise from
21 an inefficient duplication of efforts, and any decision by the
22 Commission to allow the monopoly to continue to exist must be
23 based on the public interest. James P. Paul Water Co. v. Arizona
24 Corporation Comm'n, 137 Ariz. 426, 429, 671 P.2d 404, 407 (1983).

25 As the Supreme Court has stated:

26 the regulated monopoly, which is the public policy of
27 the State of Arizona, was not established primarily for
28 the benefit of the public service corporations affected
thereby, but for the benefit of the general public,
[with] any benefits accruing to these corporations
being merely incidental to the principal object of the
rule.

Corporation Comm'n v. Pacific Greyhound Lines, 54 Ariz. 159, 178,

² Trico does not own generating facilities.

1 94 P.2d 443, 451 (1983).

2 Court decisions stating that the Commission "in effect"
3 contracts to give the holder of a CC&N a monopoly simply reflect
4 the practical result of implementing the public policy of
5 regulated monopoly. They do not hold that the Commission actually
6 entered into a binding and unalterable contract that can never be
7 modified, even when the public interest requires it. The public
8 interest controls, not the self-serving claims of those who have
9 been allowed to enjoy monopoly profits for reasons that may at one
10 time have been consistent with the public interest, but which are
11 no longer applicable. See, e.g., James P. Paul Water Co., 137
12 Ariz. at 429, 671 P.2d at 407 ("[T]he public interest is the
13 controlling factor in decisions concerning" issuance of a CCN);
14 Fernandez v. Arizona Water Co., 21 Ariz. App. 107, 109-110, 516
15 P.2d 49, 51-52 (1973). Based on the foregoing cases, it is clear
16 that there is no regulatory contract with respect to electric
17 generation.

18 **III. CLARIFICATION.**

19 AECC's statement in its Initial Brief that "[i]f the
20 Rules are changed to allow a stranded cost recovery charge to be
21 levied on non-participating customers, then any protections
22 afforded the non-participants should be applied to the special
23 contract customers as members of that group" (AECC's Initial Brief
24 at 16, lns. 13-17) should not be construed to indicate that AECC
25 agrees that such a change should be made or that such a change
26 could be made without complying with due process requirements.

27 **CONCLUSION**

28 Consistent with its Initial Brief, AECC respectfully

1 requests that the Commission not change, modify or amend the
2 proposed Electric Competition Rules, except as AECC recommended in
3 its Initial Brief, and, further, hold that the recovery of
4 stranded costs should be shared between the Affected Utilities and
5 the consumers.

6 DATED this 23rd day of March, 1998.

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